

Tom Power

We appreciate the prompt dissemination of this information to the appropriate staff members.

Mr. William F. Caton

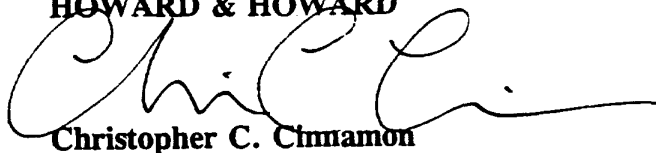
March 8, 1996

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If you have any questions, please call us.

Very truly yours,

HOWARD & HOWARD



Christopher C. Cinnamon

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HOWARD & HOWARD

ATTORNEYS

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Booth American Company

**Waiver of Small System Size
Limitation**

CSR - 4668-D

REPLY OF BOOTH AMERICAN COMPANY

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Dated: March 8, 1996

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SUMMARY

Booth American Company ("Booth American") replies to the two Oppositions filed against Booth American's Petition for Special Relief ("Petition"). With the Petition, Booth American, a small cable company, seeks a waiver of the 15,000 subscriber limit for two systems sharing a common headend. The two systems would automatically qualify for small system rate regulation but for the common headend. Franchise requirements for the two systems require collocation and linkage of headends.

The two local franchise authority consortia regulating the systems each filed an Opposition. Their arguments are identical in substance. The Oppositions' principal argument is that Booth American should be subject to large MSO rate regulation because under Form 1230 rate regulation "the Board's ability to establish the propriety or impropriety of [rate increase] will be adversely affected." Here, the Oppositions disagree with the Commission, not Booth American. The Commission has already settled this issue in the *Small System Order* and *Insight Communications*.

The Petition shows that the two linked systems share several key small system characteristics. These include: lower subscriber density, higher programming costs, higher costs relating to the operational and administrative separation of the system, and significant and costly differences in PEG access, local origination programming and I-Net requirements. Contrary to the *Small System Order*, the Oppositions argue that the Commission should ignore these factors. Surprisingly, one Opposition states that the local franchise authorities find "particular disturbing" that the Petition mentions higher programming costs as a key cost pressure warranting regulatory relief. Again, the Oppositions disagree with the Commission's conclusions in the *Small System Order* and *Insight Communications*.

These and other arguments in the Oppositions attempt to rationalize a regulatory anachronism: The local franchise authorities seek to *increase* the administrative burdens and costs of rate regulation on a small cable company. Congress and the Commission have already decided that this is *not* in the public interest.

The 1996 Telecommunications Act could also influence the Commissions analysis of the Petition. Booth American and the two linked systems at issue qualify for "greater deregulation" under Section 301(C) of 1996 Act. Federal law now defines a small cable system as one serving 50,000 subscribers or less in one franchise area. Over six franchise areas, the two linked systems serve less than half the subscribers specified by Congress for a single franchise. This could weigh in favor of granting Form 1230 relief in this case.

The Oppositions present no credible arguments justifying denial of the Petition. Booth American request that the Commission deny the Oppositions and grant the Petition.

I. INTRODUCTION

Booth American Company ("Booth American"), a small cable company under the *Small System Order*,¹ files this combined Reply to the two Oppositions² filed against Booth American's Petition for Special Relief ("Petition"). The Petition seeks a waiver of the 15,000 subscriber limit for two systems in Southeast Michigan, Booth American's Birmingham system and Bloomfield system. These two systems would automatically qualify for small system rate regulation but for franchise mandated headend collocation and linkage.

The Oppositions' principal arguments involve disagreements with the Commission, not Booth American. Contrary to the *Small System Order*, the Oppositions advocate *increasing* the costs and burdens of cable rate regulation on a small cable company. The Oppositions repeatedly disagree with conclusions reached by the Commission and the Cable Services Bureau in the *Small System Order* and in *Insight Communications*.³ The Commission has heard these arguments before; they have nothing to do with an analysis of Booth American's case.

The Oppositions also raise several arguments concerning the Petition's analysis of the higher costs faced by Booth American. Each argument fails to confront specific standards concerning small system petitions announced in the *Small System Order* and further developed

¹*Sixth Report and Order and Eleventh Order on Reconsideration*, MM Docket Nos. 92-266 and 93-215, FCC 95-196 (released June 1, 1995) ("*Small System Order*").

²Booth American received two Oppositions in response to the Petition. The Birmingham Area Cablecasting Board, the regulatory consortium representing the city of Birmingham and the Villages of Beverly Hills, Bingham Farms, and Franklin, filed one Opposition ("Birmingham Opposition"). The other consortium, the Bloomfield Cable Communications Board opposed the Petition by letter on behalf itself, the City of Bloomfield Hills and Bloomfield Township ("Bloomfield Opposition"). The Oppositions contain arguments identical in substance.

³*Insight Communications Company, L.P., Memorandum Opinion and Order*, DA 95-2334, (released November 13, 1995) ("*Insight Communications*").

in *Insight Communications*. None of the arguments supports imposing the costs and burdens of large system cost of service regulation on the Birmingham and Bloomfield systems.

The Oppositions also neglect to mention how the 1996 Telecommunications Act could impact this case. Booth American believes any analysis of the *Small System Order*'s system size standards should at least consider the expanded small operator standards established by Congress.

II. BACKGROUND

Booth American, a family owned business, satisfies the definition of a small cable company. The Oppositions do not dispute this. All Booth American systems qualify as small cable systems except one in California and the two linked systems at issue here.⁴

The Petition does not reflect a structural reorganization at Booth American. The Company recently reorganized all of its operational units by region, not just Birmingham and Bloomfield systems. The reorganization transferred the Birmingham and Bloomfield Systems to Booth Communications of SE Michigan, a wholly-owned subsidiary. Booth American undertook the reorganization for purposes of organizational flexibility and tax compliance efficiency.

The Petition contains all other relevant background information.

III. ANALYSIS

In opposing the Petition, the LFAs present at least seven discernable arguments. Most of these arguments challenge the Commission's conclusions in the *Small System Order* and the rulings in *Insight Communications*. Other arguments challenge Booth American's analysis of relevant small system characteristics that justify granting the Petition. None of the Oppositions'

⁴Petition at 1.

arguments address why a numerical standard should prevent Booth American from the benefits of small system relief in this case. Booth American replies to each argument below. First, Booth American discusses the Petition in light of the passage of the 1996 Telecommunications Act.

A. Considering the Petition in light of the 1996 Telecommunications Act.

The 1996 Telecommunications Act has brought fundamental change to cable rate regulation. This change directly impacts Booth American. Booth American now qualifies as a small cable company under Section 301(c) of the 1996 Act.

The Oppositions neglect this essential point. Instead, the Oppositions seek the strange result of imposing large MSO rate regulation on the basic tiers of Booth American, a small cable company for which Congress has expressly provided "greater deregulation".

Booth American acknowledges that small cable company deregulation under the 1996 Act and small system regulatory relief under the *Small System Order* remain distinct. The 1996 Act does not compel the Commission to expand the small system definition for Form 1230 regulation. Still, the 1996 Act may encourage even more flexibility on small system issues. Federal law now defines a small cable company as one that serves 50,000 or fewer subscribers in any franchise area. The Commission could find that this provides additional support for Booth American's petition, particularly when the two linked systems involve six franchises that in total serve less than half the subscribers specified by Congress for a single franchise.

Booth American understands that any rule change will occur in upcoming rulemakings. Nonetheless, the 1996 Act represents a significant change in the law and a clear public policy statement that could properly influence a decision on the Petition.

B. Replies to the Oppositions' Arguments.

Against this profound change in telecommunications law and regulation, the Oppositions present seven arguments advocating imposing large system regulation on Booth American. Booth American replies in sequence below.

1. This case does not require rigid application of the principal headend standard.

The Oppositions advocate inflexible application of the principal headend standard to this case.⁵ This argument ignores both the rationale underlying the principal headend standard and one critical fact in this case: The franchises mandated headend collocation and linkage.

The Commission discussed the rationale underlying the principal headend standard in *Second Order on Reconsideration*.⁶ The Commission stated, "To use a franchise area definition would result in some segments of an integrated cable operation receiving rate treatment different from other segments of the same operation."⁷ In granting the Petition, the Commission will not jeopardize this rationale. All segments of the two linked systems will receive Form 1230 rate regulation. Moreover, granting the Petition will permit Booth American to achieve regulatory consistency with its other systems. All of Booth American's systems but one automatically qualify for small system relief.

The peculiar interrelation of the franchise requirements of the two systems presents the second reason for flexibility on the principal headend standard in this case. As shown in the Petition, independent franchise provisions resulted in the requirement that Booth American

⁵Birmingham Opposition at 2; Bloomfield Opposition at 2.

⁶MM Docket No. 92-266, FCC 94-38 (released March 30, 1994); see also *Small System Order* at ¶ 35.

⁷*Id.* at ¶ 227.

collocate the Bloomfield headend with the Birmingham headend and interconnect the two systems.⁸ The Oppositions do not dispute this. Instead, the Oppositions argue that because collocation saved some initial capital costs, the Commission should disregard the franchise mandated headend linkage as a factor.⁹ This argument misses two critical points: First, Booth American's ratebase will reflect all capital cost savings. Form 1230 rate regulation will more efficiently pass any such savings through to subscribers. Second, but for the franchise mandated headend linkage, Booth American would not have to seek special relief. These facts weigh in favor of special relief. The size of the combined systems results from local regulatory requirements. The combined systems do not provide the operational or economic benefits of a large cable system.

2. The Oppositions incorrectly assert that the Birmingham and Bloomfield Systems do not share small system characteristics.

The Oppositions contend that the Birmingham and Bloomfield Systems do not share relevant small system characteristics.¹⁰ On this point, the Oppositions challenge the Commission's instructions in *Small System Order* and the Bureau's analysis in *Insight Communications*.

The Commission has recognized that a strict numerical test can exclude small systems in need of relief.¹¹ To obtain waivers of the 15,000 subscriber limit, the Commission directed such systems to demonstrate that they share relevant characteristics with qualifying systems.¹²

⁸Petition at 4.

⁹Birmingham Opposition at 3; Bloomfield Opposition at 2.

¹⁰Birmingham Opposition at 2-3; Bloomfield Opposition at 3.

¹¹*Small System Order* at ¶ 36.

¹²*Id.*

The Petitions shows that the Birmingham and Bloomfield systems share the key small system characteristics of subscriber density,¹³ higher programming costs,¹⁴ higher costs relating to the operational and administrative separation of the systems,¹⁵ and significant and costly differences in PEG access, local origination programming and I-Net requirements.¹⁶ Contrary to the *Small System Order*, the Oppositions tells the Commission to ignore these small system characteristics.

The Oppositions also fail to address another key provision of the *Small System Order*. The Commission will also consider system size waivers in cases involving linkage of headends when linkage would jeopardize small system status.¹⁷ This direction from the Commission should carry extra weight in cases like this one where pre-*Small System Order* franchises required headend consolidation.

The Birmingham Opposition seizes upon the one area where the two systems differ from small system averages, regulated and premium revenue.¹⁸ This constricted view of the facts fails to address the ruling on point in *Insight Communications*. The Bureau found that an Insight system qualified as a small system despite subscriber density comparable to large system averages. The Bureau stated, "this appears to be the only way in which the Jeffersonville system

¹³Petition at 9.

¹⁴*Id.* at 10.

¹⁵*Id.* at 14.

¹⁶*Id.*

¹⁷*Small System Order* at ¶ 36.

¹⁸Birmingham Opposition at 3.

resembles a larger system."¹⁹ The Oppositions do not identify any other large system characteristics of the two systems. *Insight Communications* controls.

3. The costs of the operational and administrative separation of the Birmingham and Bloomfield Systems remain a key relevant factor.

The Petition demonstrates that higher costs directly result from the operational and administrative separation required by the two respective local franchise authority consortia.²⁰ One Opposition concedes that "this contention may be possibly justified."²¹ The Oppositions then raise two arguments why the separation of the systems should not weigh in favor of special relief. Both of these arguments suggest some lack of familiarity with business realities for a small cable company.

The Oppositions first claim that the Commission should not consider the higher costs of the separation of the systems because the same people work on both systems.²² Apparently, the local franchise authorities ("LFAs") believe that because Booth American seeks to control costs through staffing efficiency, the Commission should not grant the Petition. This argument has two principal flaws. First, a small cable company's staffing decisions have no bearing on obtaining small system status. To the contrary, the Commission might be suspect of a small cable company that maintained excess staff to create an appearance of separation between two systems. Second, the Oppositions' argument fails to acknowledge the costs to Booth American of the distinct and separate franchise requirements itemized in the Petition. Booth American employees must attend separate meetings, prepare separate operational reports, and assist with

¹⁹*Insight Communications* at ¶ 31, n. 55.

²⁰Petition at 11-14.

²¹Birmingham Opposition at 3-4.

²²Birmingham Opposition at 4; Bloomfield Opposition at 3.

costly separate audited financial reports. The LFAs require that Booth American perform these and other efforts independently for the Bloomfield system and the Birmingham system. These efforts impose substantial costs on Booth American. These costs combine with other small cable company cost pressures and make these two systems Booth American's highest cost systems.

The Oppositions also argue that the Commission should not consider the systems as separate because Booth American recently transferred the franchises to one wholly-owned subsidiary instead of two. This argument belies the substantial business savvy possessed by the LFAs and their counsel. The geographic grouping of systems in Booth American's recent restructuring offers operational, administrative and tax efficiencies. The LFAs cannot sincerely contest this. Booth American's cost-saving reorganization harmonizes with the aim of the Petition: reducing the administrative burdens and costs of providing cable service.

4. Contrary to the *Small System Order*, the Opposition argues that the Commission should not consider higher programming costs.

The LFAs find "particularly disturbing" Booth American's suggestion that higher programming costs weigh in favor of granting the Petition.²³ One Opposition concludes that "Booth's reliance on its inability to obtain the kind of programming discounts available to larger MSOs in support of its Petition appears entirely inappropriate."²⁴ This assertion neglects the Commission's direction in the *Small System Order*. The Commission specifically identified "lack of programming or equipment discounts" as a relevant factor in assessing petitions for special relief.²⁵ On this issue, the LFAs disagree with the Commission, not Booth American.

²³Birmingham Opposition at 5-6; Bloomfield Opposition at 3.

²⁴Birmingham Opposition at 6.

²⁵*Small System Order* at ¶ 36.

In Booth American's case, this issue is especially relevant. First, as shown in the Petition, the gap period in external cost pass through forced Booth American to absorb about \$750,000 in programming cost increases.²⁶ These increases resulted when Booth American no longer benefitted from Heritage/TCI's programming discounts. Booth American has had to absorb these costs, costs directly caused by Booth's status as a small cable company. Contrary to the Oppositions, higher license fees provide substantial and appropriate support for the special relief in this case.

The Oppositions also imply that Booth American pledged to absorb programming costs following its acquisition of Heritage/TCI's interest in January 1993. Booth American must clarify one important point: Booth American *has* absorbed about \$750,000 in programming cost increases. This represents a \$31.25 per subscriber savings for the LFAs' constituents. These costs will *never* be passed to subscribers. Nonetheless, these costs add to the small company cost pressures on Booth American and, in part, justify easing regulatory burdens and costs.

5. The Oppositions ignore the Commission's conclusions concerning the burdens and costs of large system rate regulation on small cable companies.

Both in meetings with Booth American and in the Oppositions, LFA representatives have complained that Booth has not quantified the reduction in regulatory costs offered through small system regulation.²⁷ Apparently, the LFAs believe Booth American should pay for a comparative cost study to justify reducing the costs of regulation. Booth American reiterates here what it has told the LFAs: Booth American would engage in meaningless speculation in trying to estimate the costs of large system cost of service rate regulation. Most of the costs of large system cost of service showings result from how a particular LFA decides to administer

²⁶Petition at 10.

²⁷See Birmingham Opposition at 7; Bloomfield Opposition at 3.

the process. Booth American's decision not to finance a comparative cost study should not weigh against its Petition. The Commission has already addressed the issue of the burdens and costs of large MSO regulation on small cable companies.

In the *Small System Order*, the Commission stated:

[M]any operators claim that our rules place an inordinate hardship upon them in terms of the labor and other resources that must be devoted to ensuring compliance. Such comments suggest that some operators may be facing the dilemma of desiring to impose rates that our cost-of-service rules may well permit, but at the same time being averse to risking the resources that a cost-of-service showing entails since they cannot be guaranteed that the showing will be successful. In crafting the relief we adopt today, we have attempted to alleviate both the substantive and the procedural burdens of which smaller cable companies complain.²⁸

The Commission has already concluded that the costs of large system rate regulation place unnecessary burdens on small cable companies. Apparently, the LFAs remain unconvinced.

The LFAs disagreement is with the Commission, not Booth American.

6. The Commission has already settled the potential rate increase issue.

The Oppositions raise the specter of potential rate increases:

The Board [surmises] that the chief thrust motivating the Petition is the rate increases which Booth believes may more readily flow (and which would have a materially beneficial impact on Booth's financial position) if the Board found itself less able to establish the impropriety of any such rate increases.²⁹

Similarly, the Oppositions contend that the procedural protections for qualifying small systems do not serve the public interest because "the Board's ability to establish the propriety or impropriety of such increases will be adversely affected, a result which the Board deems

²⁸*Small System Order* at ¶¶ 55-56.

²⁹Birmingham Opposition at 7.

opposed to the interests of its member communities and their subscriber constituents."³⁰ The Commission has already responded to identical arguments in *Insight Communications*:

The *Small System Order* specifically allows qualifying small systems to justify potentially higher rates using the small system cost-of-service methodology. Higher rates for quality small systems is an anticipated result of small system rate relief. The County's letter simply mentions this potential outcome without contesting the reasons behind Insight's request for status as a small system.³¹

The LFAs claimed "irritation" with rate increases provides no grounds to deny the Petition. The Commission has recognized that small system rate regulation may result in rate increases where justified.

7. The Commission has already settled the LFA's public policy arguments.

The Oppositions claim that streamlined Form 1230 rate regulation does not serve the public interest.³² Without specifying how, the LFAs argue that granting the Petition will adversely affect their ability to establish the propriety or impropriety of rate increases.³³ Again, the LFAs argument is with the *Small System Order*, not Booth American. The Commission has expressly addressed how Form 1230 rate regulation results in reasonable rates and protects subscribers' interests.³⁴

IV. CONCLUSION AND REQUESTED RELIEF

The Oppositions advocate a regulatory anachronism. Congress and the Commission are either eliminating or reducing cable rate regulation. The Oppositions seek the opposite.

³⁰Birmingham Petition at 9; see also Bloomfield Opposition at 3.

³¹*Insight Communications* at ¶ 13.

³²Birmingham Petition at 9; Bloomfield Petition at 13.

³³Birmingham Petition at 9; Bloomfield Petition at 13.

³⁴*Small System Order* at ¶¶ 26, 55-58.

The Oppositions do not present any arguments that warrant imposing large MSO rate regulation on Booth American. On the other hand, Booth American has shown that the Birmingham and Bloomfield systems are particularly high cost systems and would qualify for small system relief absent the common headend. In light of these factors, and considering the expansion of small system deregulation in the 1996 Telecommunications Act, a grant of the Petition is appropriate and will serve the public interest.

Booth American respectfully requests that the Commission deny the Oppositions and grant its Petition.

Respectfully submitted,

BOOTH AMERICAN COMPANY

By: 

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**Attorneys for Booth American
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L326\CCC\Booth\bhreply

CERTIFICATION

I am Laura Petterle, Director of Operations for Booth American Company. I certify that I have read the attached Reply, that I am generally familiar with the matters addressed and understand the purpose of the document. I further certify that the factual statements set forth are correct to the best of my knowledge, information and belief.

Dated: 3/8/96

Laura Petterle
Laura Petterle

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CERTIFICATE OF SERVICE

I, Patricia Monroe, a secretary at the law firm of Howard & Howard Attorneys, P.C., hereby declare that the Reply of Booth American Company was sent on the 8th day of March, 1996 by first class and certified mail, return receipt requested and postage prepaid, to the following:

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The undersigned further declares that on the 8th day of March, 1996 the above-referred to document was sent via Federal Express to:

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

and that in a second Federal Express envelope eleven individual envelopes were sent, each containing a copy of the above-referred to document and a copy of the March 8, 1996 letter directed to Mr. Caton. The eleven envelopes were addressed as follows:

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Chief
Cable Services Bureau
Federal Communications Commission
1919 M Street NW
Washington DC 20554

Mr. Gregory Vogt
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Dated: March 8, 1996

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February 28, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M. Street, N.W.
Washington, D.C. 20554

Re: Birmingham Area Cablecasting Board;
Response to Booth American Company
Petition for Special Relief

Dear Mr. Caton:

Enclosed for filing are the original and four copies of the Response of the Birmingham Area Cablecasting Board to Booth American Company's Petition for Special Relief under the Commission's Small System Order.

Also enclosed for filing is the original Certificate of Service regarding the enclosures.

Very truly yours,


D. H. Gillis

DHG:bj
Enclosures

sc w/enc: (via fax and first
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Christopher C. Cinnamon
David E. Nims, III,

(via first class mail)
Birmingham Area Cable-
Casting Board
Derk W. Beckerleg

(via Federal Express)
Meredith Jones
Gregory Vogt
John Nakahata
Lisa Smith
Maureen O'Connell
David Furth
Mary McManus
John Norton
Thomas Power
Susan German

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	Village of Beverly Hills	MI 0662
)	City of Birmingham	MI 0664
Booth American Company)	Village of Bingham Farms	MI 0663
)	City of Bloomfield Hills	MI 0928
Waiver of Small System)	Township of Bloomfield	MI 0929
Size Limitation)	Village of Franklin	MI 0665

BIRMINGHAM AREA CABLECASTING BOARD'S

RESPONSE

TO

PETITION FOR SPECIAL RELIEF

Dated: February 28, 1996

D. H. Gillis
Attorney for Birmingham
Area Cablecasting Board
201 W. Big Beaver
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Troy, Michigan 48084
(810) 689-2880

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I. INTRODUCTION

The Birmingham Area Cablecasting Board ("the Board") consists of representatives from the City of Birmingham and the Villages of Beverly Hills, Bingham Farms, and Franklin. Among other duties delegated to the Board by its four member communities, the Board has been duly charged with the responsibility of dealing with rate regulation matters on behalf of the communities.

Booth American Company ("Booth") is the cable operator for the Board's four communities (the "Board's Communities") as well as the neighboring communities of the City of Bloomfield Hills and the Township of Bloomfield (the "Bloomfield Communities"). The Board's Communities and the Bloomfield Communities are served by a single headend. The Board's Communities and the Bloomfield Communities each number less than 15,000 subscribers. Considered together, the two groups exceed 15,000 subscribers.

Booth has filed a Petition for Special Relief (the "Petition") to obtain small system classification for its system which serves both the Board's Communities and the Bloomfield Communities.

In correspondence to the Board, Booth has represented that obtaining small system classification "...offers immediate and lasting benefits..." to the Board's Communities. The correspondence also solicited "...a letter in support of the Petition..." and further stated Booth's belief that the Board would "share" Booth's "...interest in encouraging the FCC not to lump the